

1 AMY S. PARK (S.B. #208204)  
apark@omm.com  
2 O'MELVENY & MYERS LLP  
2765 Sand Hill Road  
3 Menlo Park, California 94025-7019  
Telephone: +1 650 473 2600  
4 Facsimile: +1 650 473 2601

5 Attorneys for Defendants  
Thomas A. Bevilacqua, Bruce G. Bodaken,  
6 Mariann Byerwalter, Jerome D. Gramalia,  
John W. Larson, Robert L. Metzger and  
7 Edward C. Nafus

8 [Additional Counsel on Signature Page]

9  
10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12

13 MELVYN KLEIN,  
14  
15 Plaintiff,  
16  
17 v.  
18 JOSEPH L. JACKSON, et al.,  
Defendant.

Case No. 18-cv-04445-JSW

**JOINT STATUS  
UPDATE**

19 The parties submit this joint status update in response to the Court's February  
20 4, 2022, Order requiring a report on the current status of this matter.

21 On July 23, 2018, Plaintiff Melvyn Klein, then a shareholder of WageWorks,  
22 Inc., filed this shareholder derivative case on behalf of WageWorks. Soon  
23 thereafter, the Court entered an order staying the case indefinitely.

24 On August 30, 2019, WageWorks merged with HealthEquity, Inc. As a  
25 result of that transaction, Defendants contend Plaintiff and all other WageWorks  
26 shareholders lost standing to pursue any derivative claims as a matter of law.  
27 Plaintiff contended, however, that under Delaware law applicable to WageWorks,  
28

1 he had an economic interest in the derivative litigation and possessed a direct  
 2 inseparable fraud claim to remedy unlawful conduct that occurred pre-merger. *See*  
 3 *ParfiHolding AB v. Mirror Image Internet, Inc.*, 954 A.2d 911, 939 (Del. Ch.  
 4 2008); *Ark Teacher Retirement System v. Caiafa*, 996 A.2d 321, 323 (Del. 2010).  
 5 This claim for inseparable fraud was litigated in a separate, parallel action in *In re*  
 6 *WageWorks Derivative Litigation*, Lead Case No. 18CIV03264, California Superior  
 7 Court, San Mateo County. That action was dismissed without prejudice on forum  
 8 selection grounds and the dismissal was affirmed on appeal.

9 On February 17, 2022, counsel for Plaintiff filed a Suggestion of Death Upon  
 10 the Record pursuant to Federal Rule of Civil Procedure 25(a), informing the Court  
 11 and Defendants of Plaintiff's passing.

12 Defendants submit that the Court should now enter an order dismissing this  
 13 action and closing the case. Rule 25(a)(1) provides:

14  
 15 Substitution if the Claim Is Not Extinguished. If a party dies and the claim is  
 16 not extinguished, the court may order substitution of the proper party. A  
 17 motion for substitution may be made by any party or by the decedent's  
 18 successor or representative. If the motion is not made within 90 days after  
 19 service of a statement noting the death, the action by or against the decedent  
 20 must be dismissed.

21 Fed. Civ. Proc. R. 25(a)(1). Defendants contend that because the WageWorks-  
 22 HealthEquity merger extinguished the right of Plaintiff and all other WageWorks  
 23 shareholders to pursue a derivative claim on WageWorks' behalf, there is no legal  
 24 right or basis for any person to be substituted in Plaintiff's place. Accordingly,  
 25 Defendants respectfully submit that this action should be dismissed now and an  
 26 order be entered closing the case.

27 Plaintiff's counsel is currently aware of no shareholder other than Mr. Klein  
 28 or those who take under his death as potentially claiming any legal right or  
 authority to substitute in as a plaintiff in this derivative action.

1 Dated: February 18, 2022

AMY S. PARK  
O'MELVENY & MYERS LLP

3 By: /s/ Amy Park

4 Amy S. Park  
Attorneys for Defendants  
5 Thomas A. Bevilacqua, Bruce G. Bodaken,  
6 Mariann Byerwalter, Jerome D. Gramalia,  
7 John W. Larson, Robert L. Metzger and  
Edward C. Nafus

8 Dated: February 18, 2022

9 MICHAEL S. DICKE  
10 CATHERINE KEVANE  
11 KATHERINE MARSHALL  
FENWICK & WEST LLP

13 By: /s/ Catherine Kevane

14 Catherine Kevane  
Attorneys for Defendant  
15 Joseph L. Jackson

16  
17 Dated: February 18, 2022

18 IGNACIO SALCEDA  
19 WILSON SONSIN GOODRICH  
& ROSATI  
PROFESSIONAL  
CORPORATION

21 By: /s/ Ignacio Salceda

22 Ignacio Salceda  
Attorneys for Nominal Party  
23 WageWorks, Inc.

1 Dated: February 18, 2022

THOMAS J. MCKENNA  
GAINEY McKENNA & EGGLESTON

3 JON A. TOSTRUD  
4 TOSTRUD LAW GROUP, P.C.

6 By: /s/ Thomas J. McKenna  
7 Attorneys for Plaintiff

8  
9 I hereby attest that I have on file all holographic signatures corresponding to any  
10 signatures indicated by a conformed signature (/S/) within this e-filed document.

11 Dated: February 18, 2022

AMY S. PARK  
O'MELVENY & MYERS LLP

14 By: /s/ Amy Park  
15 Amy S. Park